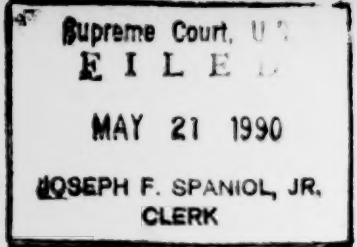


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89-1807



NO. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE UNITED STATES OF AMERICA

TERM \_\_\_\_\_

---

RONALD E. BROWN,

Appellant,

vs.

THE CITY OF SEATTLE,

Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO  
REVIEW A DECISION FROM THE COURT OF  
APPEALS OF THE STATE OF WASHINGTON

Counsel for Appellant

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### QUESTIONS PRESENTED

1. It is a violation of the 5th, 6th, and 14th amendment right to counsel for an arresting officer to repeatedly elicit incriminating information after the defendant asserted right to remain silent and to counsel;
2. It is a violation of the 14th Amendment right to due process and of the 6th Amendment to deny defense motion to dismiss or for a continuance, when the prosecutor disobeyed court order to produce discovery, falsely misled the court as to the nature and existence of the documents, and disregarded defense expert's sworn statement that the documents were necessary to prepare a defense.

## PARTIES

The parties or the proceeding are listed  
in the caption of the case herein.

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## OFFICIAL/UNOFFICIAL OPINION

Decision on RALJ Appeal, 7/5/89 (Appendix 2), Order on RALJ Motion for Reconsideration, 7/14/89 (Appendix 3), Commissioner's Ruling Denying Discretionary Review, 10/18/89 (Appendix 1), Opinion denying review, 3/20/90 (Appendix A).

## JURISDICTIONAL GROUNDS

A decision affirming a Municipal Court judgement was rendered on July 5, 1989 by the King County Superior Court; Reconsideration of that decision was denied July 14, 1989. Discretionary review was declined by the Court of Appeals on October 18, 1989 and by the State of Washington Supreme Court on March 20, 1990. The statutory provision relied upon conferring jurisdiction to this court to review the judgement by writ of certiorari is 28 USC 1257.

CONSTITUTIONAL PROVISIONS

Constitution of the United States,  
Amendment 5.

(Appendix 5)

Constitution of the United States,  
Amendment 6.

(Appendix 5)

Constitution of the United States,  
Amendment 14, Section 1.

(Appendix 5)

## STATEMENT OF THE CASE

### SUMMARY

This is a case where a DWI (Driving While Intoxicated) suspect was purposefully interrogated when he asserted his right to remain silent and requested his attorney. The resulting evidence was used at trial to convict him. It was the only direct evidence of the alleged use of intoxicants, as defendant had refused a field of sobriety test and a breathilizer test.

Defendants planned to demonstrate that the road conditions, and not intoxication, caused the accident. Defense expert

presented a sworn statement that certain engineering data would be needed to prepare a safety analysis. The court ordered the city to produce the data, but the prosecutor failed to do so, falsely claimed all records were produced, falsely claimed to not understand the specific request, and falsely represented facts to the court.

In reliance on the prosecutor's false statements, the trial court denied defense motion to dismiss or for a continuance.

Defendant's first trial was a hung jury; he was convicted of DWI and negligent driving after a second trial.

MIRANDA PROCEDURE: Defendant Brown refused sobriety tests at the accident scene and asserted a desire to consult his attorney. He informed the officer that she was on her way to the accident scene. RP 5/19/88 at 37,38

Brown was taken to the police station and Mirandized. RP 5/19/88 at 41, lines 1 --2. The officer suggested Brown call another lawyerbut Brown replied he wanted to speak to his lawyer who was en route. Id. at 30.

This incident occurred outside usual office hours; the officer suggested Brown call a public defender,but offered no telephone number. Id. The Officer

continued to evoke incriminating statements from Brown. Brown was not mirandized again. Instead, the officer waited 15 to 20 minutes. Then he asked Brown to proceed with the tests. He convinced Brown to proceed by promising to bring Brown's lawyer as soon as she arrived.

Brown never initiated communication with police and he never retracted his request to speak with his lawyer. (Id. at 30, 31, 42.)

The responses to the interrogation were utilized to fill out an Alcohol Information Report (AIR), which was admitted at trial. (Proceedings before Judge Bernstein 8/16/88 pg. 1-5.) Among other statements, Brown admitted to having two drinks of bacardi and eoke, and believed that it was 11:00 PM when it was really 8:10 PM. Brown refused to take other sobriety tests. (Id. at p.7.)

## DISCOVERY PROCEDURE

The defense submitted a general discovery request dated May 25, 1988 as follows:

"4. All records, and files, regarding accidents, complaints, and repairs to the street at or near the intersection where the accident occurred."

These were not produced. Following is a chronology of subsequent attempts to obtain discovery:

April 14, 1988: A subpoena duces tecum was issued by defense counsel to the records custodian for "Any and all documents or records containing facts relating to this matter, particularly any all records or documentation of accidents, complaints, repairs, lighting, changes in road configuration, or in any other records whatsoever relating to the vicinity of 2500 Blk. E. Montlake Pl. E., Seattle, WA." The prosecutor informed defense counsel that a court order would be necessary to produce the

documents. (Decision of Counsel, 6/2/88, p.1., paragraph 3.)

May 4, 1988: Pretrial hearing, at which the court expressed the expectation that these items would be produced, or, if not, a subpoena would be issued.

May 19, 1988: The court signed a subpoena for the above- listed discovery. The subpoena was served per the City Attorney's instructions. The caption erroneously stated, "Superior Court", and not, "Municipal Court."

May 27, 1988: Counsel for the City refused to comply with the subpoena, after defense counsel verbally clarified the caption and offered a continuance to allow time to receive the documents. (Id., p.3. paragraph 9.)

June 3, 1988: Defense's first motion to dismiss. The Prosecutor opposed the discovery, claimed confusion about the subpoena's erroneous caption, and asserted that there was not enough time to comply

with the subpoena. The court ordered the City to comply with the subpoena by June 8, 1988. (RP 6/3/88)

June 8, 1988: An 8 page computer summary of accident and sign data was given to Defensa Counsel. No documents regarding maintenance, repair, complaints, traffic volume, or underlying source documents were produced.

June 17, 1988: Defense renewed motion to dismiss for failure to produce. Defense presented the Declaration of Robert Johnson, safety and traffic engineering expert, verifying that source documents and not computer summaries were necessary for him to prepare a safety analysis of the area.

The prosecutor denied there were any additional documents available. The trial court suggested the issue be solved by subpoenaing a witness from the Engineering Department to set forth documents in existence responsive to the subpoena. (RP 6/17/88)



June 20, 1988:The prosecutor represented that he had confirmed with the Engineering Department that no further documents existed.

Defense counsel made an offer of proof that she had subpoenaed Engineering personnel who would testify that all data requested did exist in the Engineering Department. (RP 6/20/88, Tape # 88-3119)

June 20, 1988The trial court took testimony from subpoenaed Engineering Department personnel who verified that data on traffic volumes, traffic studies, speed studies, travel time studies, maintenance records on traffic control devices and traffic signs, were all maintained. Furthermore, copies of all accident reports and source documents for the summary computer printout were available. They could not be accessed through any other department because the Engineering department used its own number index and categorized

continued to invoke incriminating statements from Brown. Brown was not mirandized again. Instead, the officer waited 15 to 20 minutes. Then he asked Brown to proceed with the tests, convincing him to proceed by promising to bring the lawyer to see him as soon as she arrived.

Brown never initiated communication with police and he never retracted his request to speak with his lawyer. Id, at 30,31,42.

The interrogation was utilized to fill out an Alcohol Information Report (AIR), which was admitted at trial. Proceedings before Judge Burnstein 8/16/88, pp 1--5. Among other statements, Brown admitted to having 2 drinks of bacardi and coke, and believed it was 11:00 PM when it was really 3:10 PM. Brown refused to take any other sobriety tests. Id at 7.

by accident location. The department would produce the data, but only if the prosecutor directed them to do so. RP

6/20/88 Tape # 88-3131.

The court ordered the documents produced. The documents were not produced prior to the first trial, because the defendant refused to waive speedy trial. The result was a hung jury and charges were immediately refiled.

July 19, 1988: Defense counsel demanded by letter to the prosecutor that the subpoena and court order be complied with. Defense counsel also learned that the scene of the accident had been repaved and demanded supplemental discovery of all tests, materials used in repaving, criteria in determining what roads to repave and any other information relating to the decision to repave the road.

On or about July 21: Defense counsel

spoke to the prosecutor by telephone and reiterated that she expected the documents, as identified by the City's own Engineering Personnel, to be produced.

No documents were produced.

August 11, 1988: Defense brought a motion to dismiss for failure to provide discovery and for prosecutorial misconduct. The prosecutor directly misled the court and misrepresented facts before the court; a judge with no background in the prior proceedings was on the bench.

The prosecutor specifically stated the following:

1. Accused defense counsel of abusing the court process by demanding discovery "ad nauseum," and by deceiving the court to obtain a dismissal. RP 8/11/88.

2. Falsely represented, contrary to prior Engineering personnel testimony, that the accident reports were available from other sources. He claimed that Engin-

eering personnel had said this was true, when the opposite was true because the Engineering department kept a separate numbering system, uniquely coded to the location of accidents. RP 8/11/88.

3. Falsely represented, contrary to the prior meticulous record and his one admission on the record, that he had no idea what documents existed in response to the subpoena, or what specifically was being requested. RP 8/11/88. Previously when asked by the court if he was clear on what documents existed in response to the subpoena, he had told the court that "everything's been clarified" RP 6/20/88.

The judge, who had not held any of the previous hearings in the case, believed the prosecutor's false representations. It ruled that the subpoena was "too vague for anybody to produce."

ROP 8/11/88.

The motions were denied and a continuance was denied. Trial began on Monday, August 15 and Brown was convicted of DWI and negligent driving on August 16, 1988. Documents were never produced.

## QUESTIONS TIMELY RAISED ON APPEAL

The Constitutional issues herein were timely raised as follows:

1. IN the brief of Appellant in the King County Superior Court, pp 20--23; 28.
2. In the Motion for Discretionary Review in the State Court of Appeals, issues 1,2, and 3, treated in the Commissioner's ruling denying Discretionary Review.
3. In the Petition for Review to the State Supreme Court, pp 8,9,13,15,16.

## ARGUMENTATION

ISSUE I: IT IS A VIOLATION OF THE 5th, 6th, and 14th amendment right to counsel for the arresting officer to repeatedly elicit incriminating information after the defendant asserted Miranda rights to remain silent and to counsel; the case must be dismissed or reversed and evidence suppressed.

Generally, in-custody interrogation is coercive, even if apparently friendly. When an accused invokes the right to remain silent, all questioning must cease. State v. Corethan 684 P2d 355, 38 W App 231 (1984). Further questioning does not waive the right to counsel. (1981) State v. Coles 625 P2d 713, 28 W App 563. The right to have counsel at interrogation is indispensable to protection of the privilege against



self incrimination. Miranda v. State of Arizona (1966) 86 S. Ct. 1602, 384 U.S. 436, 16 L. Ed. 2d 694, reh den. 875 S. Ct 11, 385 U.S. 890, 17 L. Ed. 2d 121.

Questioning after assertion of Miranda rights may resume only after a significant period of time and only if there is a fresh set of Miranda warnings on requesting. Failure to observe these processes violates the 5th Amendment to the U.S. Constitution.

The 6th amendment to the U.S. Constitution, Right to Counsel, extends to "drunk driving" charges. State v. Carmod 140 Vt. 631, 442 A 2d 1292. The right to counsel is violated if defendant is interrogated regarding a crime after he states that he does not want to discuss the matter until he talks with a lawyer. Robinson v. Percy (CA Wis 1984) 738 F 2d 214.

The right to assistance of counsel is also an essential requirement of due process, provided for under the 14th Amendment to the U.S . Constitution. U.S. Ex Rel Konigsberg v. Vincent DCMY 195, 388 F. Supp 221, Aff'd 526 F 2d 131, cert den 96 S Ct 2655, 426 U.S. 937, 49 L. Ed. 2d 388.

Review should be accepted in this case because the Washington courts' decision violated the key guarantees as embodied in the above-cited caselaw. That caselaw is representative of State and Federal case law which has developed since the historic Miranda decision, cited above. The Washington Court violated the principles of that decision, and violated that principle as expressed uniformly in decisions of other States and federal courts. It violated, most distastefully, those principles as expressed

in Washington State Case Law. \*

Specifically, in this case, defendant's assertion of the right to remain silent was not scrupulously honored. In fact, the officer proceeded, in the inherently coercive environment of a jail cell, to cajole Brown to make statements. The officer deliberately tried to make

\* The ruling denying Petition for Review in the State Supreme Court, Appendix 4, refers to the court's belief that the transcript of the suppression hearing, the "3.5" hearing, was not in the original court record on review. This is an error on the part of the court. Because review was not accepted, the actual Superior court record was not before the court and thus the court was evidently confused. In any event, in its ruling the court found that "[T]he officer also may have improperly questioned Mr. Brown about the crime after he requested counsel." , but neatly skirted the Constitutional issue by determining that the statements made were not "significant." Brown admitted he was drinking, and failed to know what time of day it was. As he refused the breathalyzer test, these admissions were the backbone of the prosecution's case.

Brown change his mind by promising to bring the attorney "right back" when she arrived. See State v. Wheeler 108 W 2d 230, 737 P2d 1005 (1987). Coercion is presumed if deliberate elicitation occurs once Miranda rights are asserted. State v. Franklin 48 W. App 681, 739 P2d 1047 (1987).

Where evidence is obtained in violation of the Constitution, there is no need to balance the benefit of exclusion against the consequences of exclusion, and reversal/suppression is therefore mandated. State v. Bonds 653 P 2d 1024, 93 W 2d 1 cert den 104 S Ct 111, 464 U.S. 831, 78 L. Ed. 2d 112 (1982). Accord, State v. Aydelotte 665 P 2d 443, 35 W App 125 (1983).

The State court erred--this is a "significant" issue. A person was convicted utilizing direct inculpatory evidence in violation of his right to counsel.

The U.S. Supreme Court is Brown's court of last resort, and for him, these guarantees are "significant." They are "significant " only if every citizen can be sure that they are, indeed, enforceable rights, in State as well as federal court.

ISSUE II: IT IS A VIOLATION OF THE  
14TH Amendment right to due process  
to deny defense motion to dismiss  
and/or for a continuance, when the prosec  
disobeyed direct court order to produce  
discovery, falsely misled the court  
as to the nature and existance of the  
documents, and disregarded expert's  
statement that the documents were necessary  
to prepare a defense.

Production of evidence safeguards  
the defendant's right to Due Process.  
U.S. v. Friedman 593 F2d 109 ( C.A.  
Wash. 1979).

Delays or prevention of preparation  
of a defense by the prosecutor is also  
a violation of the 6th Amendment. See:  
U.S. v. Solomon 753 F 2d 1522 (1985);  
U.S. v. Saunders 641 F 2d 1980 cert  
den 110 S Ct 3055, 452 U.S. 918, 69  
L. Ed. 2d 422 (1980); State v. Kernik

698 P 2d 573 (1985). A deliberate attempt to impede the defense violates speedy trial rights. State v. Tucker 32 W App 908, 651 P 2d 220 (1980).

Deliberate misrepresentation by a prosecutor of matters of fact which deny the defendant a fair opportunity to prepare for trial may constitute such unfair, dishonest, and ignoble conduct as to deny due process of law. State v. Kahim (1972) 498 P2d 635, 53 Haw 536, cert den 93 S. Ct. 944, 409 U.S. 1126, 35 L. Ed. 2d 253.

Due process requires the prosecution to disclose material evidence, upon request by defendant , when evidence would tend to exculpate defendant. Ex Parte Womak ( Ala 1988) 541 So. 2d 47, on remand, 541 So. 2d 74.

It is denial of due process for a prosecutor to withhold from the defense any evidence favorable to the accused.

Hamilton v. Jamieson D.C. Ps (1973),  
355 F. Supp 290. State v. Taylor (Tenn,  
1989) 771 S.W. 2d 387. This is true  
regardless of the prosecutor's good  
faith or bad faith. U.S. v Hart ACNR  
1989 27 M.J. 839.

Failure to disclose, for instance,  
a videotape which may have been exculpatory  
if it contained certain facts, was a  
violation of defendant's right to due  
process in Ex Parte Dickerson (Ala  
1987) 517 So. 2d 628, on remand 517  
So 2d 631. Thus, if the information  
existed but was never disclosed, it  
must be presumed exculpatory or favorable  
if it could have been such.

Evidence is material if there is  
a probability sufficient to undermine  
confidence in the outcome, that the  
result of the trial would have been  
different. Landano v. Rafferty (DNJ  
1987) 670 F. Supp 570, Recon. Den 675  
F. Supp 204, Aff'd 856 F2d 569.



Suppression or destruction of evidence warrants dismissal of charges against a defendant. State v. Palmer (Mont 1983) 673 P2d 1234.

The worse the conduct of the Prosecutor, the less prejudice to the accused is needed for reversal. Simos v. Gray D.C. Wis 1973, 356 F Supp 265.

In this case, the Washington court turned a blind eye to the blatant and dishonest conduct of the City prosecutor. Not only did the City fail to obey the court order to produce data, but by doing so it, and only it, retained possession of the data in question. The State court seems to reject Brown's appeal because he could not prove the exact contents of the discovery. HE could not prove the contents, because the discovery was in the exclusive possession of the City and because after more than 100 days and repeated motions, demands,

hearings, and other court proceedings, the State court failed to enforce its own ruling awarding discovery to the defendant. It deprived the defendant of discovery when the prosecutor's case was already weak, as evidenced by the first hung jury.

In this case, the State has made a sham out of due process. The State Court opinions veritably yawn and avoid comment on the prosecutor's evasiveness and lies. The prosecutor is rewarded by the State court ruling for his disobedience of court orders and other dishonest and ignoble acts.

In extraordinary attempt to make a record of the nature of discovery, defendant called a hearing to prove to the court the data was available, and offered an expert who needed the data to prepare a road safety study. Road conditions were his prime defense against

the criminal charges of drunken driving and negligent driving. This was seen as material by the trial court, and it was ordered produced on several occasions. (The judge who finally denied the dismissal had not been on the bench for the prior orders.) This suspect trial outcome surely would have been affected by a safety study of a road that was repaved shortly after the accident in question.

This issue should be accepted for review. It presents a compelling factual scenario for review in that it reaches to the very heart of the issue of due process in discovery. It presents the situation where the defense can prove that a wealth of specific documents exist, but cannot prove their factual content because they are jealously held back by a self-serving prosecutor.

It is violative of every due process notion to allow the opposing party to edit or choose what discovery to supply.

Yet the Washington court begged the question by dismissing the discovery as "not material." IN doing so, it contradicted the orders of its own Municipal court level judges who ordered the discovery.

The specificity, the numerous rulings, and the well developed record are aspects of this case that have been lacking in other cases reviewed by this court, when the court was forced to conclude that discovery requests were too vague or there was not an adequate record to support the assertion that specific evidence existed. This issue should be reviewed as a blueprint for establishing parameters for the conduct of defense counsel and a mode of developing a record when defense counsel needs to establish the existance of necessary documents.

### CONCLUSION

Both of the questions presented herein, the in-custody interrogation and the prosecutorial misconduct, should be reviewed by this court.

The facts are of shocking boldness; the State court ruled opposite established caselaw, and oppositeadmitted violations of permissable in-custody interrogation and blatant refusal to enforce the discovery orders of the lower courts.

Review of this case will not only address an injustice for the individual Brown, but it will clarify that the U.S. Supreme Court does not tolerate trial by ambush in any State or local jurisdiction.

The court is respectfully requested to accept certiorari.

DATED this 17th day of May, 1990.

Jean Schiedler-Brown  
Attorney for Petitioner

CITY OF SEATTLE, ) IN THE COURT OF APPEALS  
Respondent, ) FOR THE STATE OF  
v. ) WASHINGTON, DIV I  
RONALD BROWN, )  
Petitioner. )

No. 24641-1-I

COMMISSIONER'S RULING DENYING  
DISCRETIONARY REVIEW

Petitioner Ronald E. Brown seeks discretionary review of the RALJ decision affirming his convictions in Seattle Municipal Court of driving while under the influence and reckless driving. Petitioner has filed a motion for discretionary review; the City has filed a response in opposition. The motion was set for oral argument.

RAP 2.3(d) provides that review of a superior court decision entered in a proceeding to review a decision of a

-court of limited jurisdiction will be  
accepted only:

(1) If the decision of the superior court  
is in conflict with a decision of the  
Court of Appeals or the Supreme Court;  
or

(2) If a significant question of law  
under the Constitution of the State of  
Washington or of the United States is  
involved; or

(3) If the decision involves an  
issue of public interest which should be  
determined by an appellate court; or

(4) If the superior court has so far  
departed from the accepted and usual  
course of judicial proceedings, or so  
far sonctioned such a departure by the  
court of limited jurisdiction, as to  
call for review by the appellate court.

In his motion for discretionary review

Brown presents five issues which he contends meet these criteria:

- (1) It was error for the trial court to deny the motion to dismiss when the arresting officer repeatedly elicited incriminating information after the defendant asserted Miranda rights to remain silent and to counsel.
- (2) It was error for the trial court to deny defense motion to suppress in custody statements of defendant, solicited by the arresting officer without fresh Miranda warnings after defendant had asserted Miranda rights.
- (3) It was error to deny defense motion to dismiss when the prosecutor disobeyed court order to produce discovery, and falsely mislead the court as to the existence of the documents, the factual



nature of the documents, and the prosecutor's knowledge of the documents, when the discovery was revelant and the defense expert needed the information in order to prepare a defense.

(4) It was error to exclude data from trial, which was produced by the engineering department, when it was admittedly authentic, and the prosecutor had control over the foundational data and had refused to produce it.

(5) It was error to permit the prosecutor to testify that defendant had been offered other sobriety tests and refused them, and to allow the prosecution to argue this in closing.

In the RALJ decision, however, the trial court only considered issue 3, the discovery issue stating "[t]hat the record provided by the appellant is insufficient—

for the court to decide the remaining issues raised by appellant. A continuance to supplement the record is denied."

Brown asserts that all issues are appropriate for review since he subsequently provided the superior court with sufficient record in a motion for reconsideration which was denied. In the order denying reconsideration the trial court merely found "good cause to reaffirm" the previous order on RALJ appeal. There is no formal decision of record relating to any of the issues presented other than the issue concerning discovery. According to the City's response to the motion for discretionary review, the record is still too incomplete to review the issues presented since Brown has not provided the complete pretrial and trial record. Since it does not appear that the trial

court considered the issues and the full record has not been prepared, issues 1,2,4,and 5 do not warrant acceptance of discretionary review pursuant to the criteria of RAP 2.3 (d).

AS it relates to the discovery issue and the denial of Brown's motion to dismiss, it does not appear that there was prosecutorial misconduct justifying a dismissal.

Nor has Brown demonstrated the required showing of materiality required under the discovery rules justifying the sanction of dismissal for failure to disclose.

AS the court held in State v. Gonzalez 110 WN.2d 738, 750, 757 P.2d 925 (1988), a defendant must make a showing beyond a mere possibility that the evidence sought might have helped the defense or might have affected the outcome of the trial. There must be a plausible showing that the evidence would have been material to the defense. In reviewing the limited

transcripts of the various municipal court hearings it is clear that the ultimate decision by Judge Yanick denying the motion to dismiss for alleged discovery violations was based upon the lack of specificity concerning the request and a lack of showing of materiality. In the original notice of deposition and subpoena duces tecum jBrown sought any and all records or documentation of accidents, complaints, repairs, lighting, changes in road configuration, and any other records whatsoever relating to the vicinity of the 2500 block of East Montlake Place East, Seattle, Washington.

Brown has not demonstrated how any such evidence would be material to his defense to the charges. Accordingly, the trial court did not abuse its discretion.

In sum, the Superior Court decision affirming the municipal court's decision is neither in conflict with a case in this court or the Supreme Court nor has

Brown presented a significant question of Constitutional law or an issue of public interest. Brown has not presented an issue which warrants review within the criteria of RAP 2.3 (d). Accordingly, the motion for discretionary review is denied. Now therefore it is hereby

ORDERED that the motion for discretionary review is denied.

Done this 18 day of October, 1989.

LARRY A. JORDON

Court Commissioner

SUPERIOR COURT OF WASHINGTON  
COUNTY OF KING  
CITY OF SEATTLE,

Plaintiff-respondent

vs.

RONALD E. BROWN

Defendant-appellant

- - - - -

No. 88-1-04583-2

DECISION ON RALJ APPEAL

This appeal came on regularly for oral argument on 7--5, 1989, pursuant to RALJ 8.3, before the undersigned judge of the above entitled court and after reviewing the record on appeal and considering the writtenda nd oral argument of the prties, the court holds the following:

Reasoning regarding assignment of Error: That JUDGE Yanick did not err by denying defendant's motion to dismiss

based upon the alleged discovery violations;  
that the record provided by appellant  
is insufficient for the court to decide  
the remaining issues raised by appellant.  
A Continuance to supplement the record  
is denied.

IT IS HEREBY ORDERED that the above  
cause is AFFIRMED; REMANDED to Municipal  
court for reimposition of sentence in  
accordance with the above decision and  
that the Superior Court Clerk is directed  
to release any bonds to the lower court  
after assessing statutory Clerk's fees  
and costs.

DATED 7 - 5 - 89

MARCIA PECHMAN  
JUDGE

Jean Schiedler-Brown  
Counsel for Appellant

Counsel for Respondent

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

RONALD E. BROWN,

Appellant,

vs.

THE CITY OF SEATTLE,

Respondent

- - - - -

No. 88-1-04583-2

ORDER ON RALJ MOTION FOR RECONSIDERATION

The above entitled court having heard a motion for reconsideration filed by appellant, This court has reviewed all pleadings and papers previously on file in this matter, including defendant's motion for reconsideration and attached excerpts from the proceedings below. Based on the foregoing, this court has considered its order entered on the 5th



day of July, 1989, and finds good cause to reaffirm that order.

IT IS HEREBY ORDERED that Appellant's motion for reconsideration is denied.

DATED July 14, 1989.

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JUDGE Marsha J. Pechman

THE CITY OF SEATTLE, ) IN THE SUPREME COURT  
Respondent, ) FOR THE STATE OF  
v. ) WASHINGTON  
RONALD E. BROWN, )  
Petitioner. )

NO. 5 6 8 5 3 - 7

RULING DENYING MOTION FOR  
DISCRETIONARY REVIEW

In August Of 1988, Ronald Brown was convicted in Seattle Municipal Court of reckless driving and driving while under the influence of intoxicants. In his RALJ appeal to Superior Court, Mr. Brown raised several issues, including a claim that charges should have been dismissed because the prosecutor had violated discovery orders. The Superior Court rejected Mr. Brown's discovery argument; it declined to address his remaining claims, however, because the record he had provided was insufficient to permit their consideration. Mr. Brown's motion for discretionary review, again raising several issues, was denied by

the Court of Appeals. Mr Brown now seeks review by this court.

Mr. Brown's pleading to this court is captioned a "Petition for Review," and it refers to the review criteria set forth in RAP 13.4(b). A party may petition for review only of a Court of Appeals' decision "terminatin review," however, and such a decision can only be made after review is accepted. RAP 12.3(a)(1). The Court of Appeals' refusal to review a Superior Court's RALJ decision terminating review. Review by this court is therefore available only by motion for discretionary review. RAP 13.5. Mr. Brown's "petition" will be treated as such a motion. RAP 13.3(d).

For the reasons explained below, Mr. Brown has not shown that the Superior Court's decision merited review under any of the criteria set forth in RAP 2.3(d), or, therefore, that the Court of Appeals' denial of review constitutes obvious or

probable error under 13.5(b).

Mr. Brown first claims the municipal court should have either dismissed the charges or suppressed certain inculpatory statements because the arresting officer continued interrogating him after he asserted his right to counsel. The Superior Court did not address this issue because Mr. Brown did not provide that court with a transcript of the CrRLJ 3.5 hearing. As Commissioner Jordan noted in his ruling denying review by the Court of Appeals, it is the appellant's obligation to provide the appellate court with sufficient portions of the record to permit review of the assignments of error. RALJ 6.3A(a), (c); *State v. Garcia*, 45 Wn. App. 132, 140, 724 p.412 (1986).

When he moved to modify Commissioner Jordan's ruling, Mr. Brown provided the Court of Appeals with transcript excerpts from the CrRLJ 3.5 hearing. Nonetheless, this material was not part of the Superior Court record, and the Superior Court made

no decision as to any issues it may reveal. The partial transcript therefore does not support Mr. Brown's assertion that the Superior Court's decision should be reviewed to remedy a conflict with decisions of this court. See RAP 2.3(d)(1).

Nor was the Court of Appeals required to review the Superior Court's decision simply because Mr. Brown identified a possible constitutional issue. Review of any RALJ decision is discretionary, RAP 2.2(c), and RAP 2.3(d)(2) refers to "significant" questions of constitutional law. Nothing about Mr. Brown's "interrogation" presents a novel or significant constitutional question.

The portion of the record now available shows the officer properly required Mr. Brown to decide whether to take the breathalyzer test after giving him an opportunity to telephone the public defender's office. See *State v. Staeheli*, 102 Wn. 2d 305, 309, 685 P. 2d 591 (1984);

State ex rel Juckett v. Evergreen Dist. Ct., 100 Wn. 2d 324, 831, 675, P. 2d 599 (1984). His refusal to take the breathalyzer test was admissible under RCW 46.61.571. State v. Long, 113 Wn. 2d 266, 773, P. 2d 1027 (1989) (limiting State v. Zwicker, 105 Wn. 2d 228, 713 P. 2d 1101 (1986)), which Mr. Brown cites, to cases arising under pre-1986 statute). Although the officer also may have improperly questioned Mr. Brown about the crime after he requested counsel, see Edwards v. Arizona, 451 U.S. 477, 68 L. Ed. 2d 373, 101 S. Ct. 1880 (1981), Mr. Brown still has not provided the record which would be necessary to determine whether his generally innocuous answers affected the outcome of trial.

Mr. Brown also challenges the Superior Court's resolution of the one issue that court did decide on the merits--whether the prosecutor's alleged violation of a discovery order requires dismissal of the charges. I find no error in the lower courts'

disposition of this issue. Defense counsel requested the City Engineer to produce "any and all information regarding complaints, accidents, street repairs, reports regarding street hazards or change or repair of street signs. . . for the past two years" along the city block on which Mr. Brown was arrested. When defense counsel objected that she had not received "everything," the prosecutor offered to go with her to the engineering department "right now" and "do my best to get whatever she thinks she wants." Mr. Brown has not shown that any unavailable documents were relevant and material to his defense.

The motion for discretionary review is denied.

Dated at Olympia, Washington, March 22,  
1990

Geoffrey Brooks  
COMMISSIONER

**AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL  
CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION;  
DUE PROCESS OF LAW; JUST COMPENSATION FOR  
PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



## **AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT 14 TO THE UNITED STATES CONSTITUTION, SECTION 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.